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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1976
No. 76-5729

MARK DAVID OLIPHANT and DANIEL B. BELGARDE, *Petitioners*,

v.

THE SUQUAMISH INDIAN TRIBE, et al., *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF ATTORNEY GENERAL OF THE STATE OF WASHINGTON AS AMICUS CURIAE IN SUPPORT OF JURISDICTIONAL STATEMENT

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I.

INTEREST OF AMICUS CURIAE

The split decision (2 to 1) by the Ninth Circuit Court of Appeals in *Oliphant v. Schlie, et al.*, (No. 74-2154, August 24, 1976, unreported) has concluded that an Indian tribe has jurisdiction to prosecute in tribal court non-Indians who while on an Indian reservation commit acts which are declared to be crimes under the tribal criminal code. Both the majority and the dissent have explicitly recognized that this question has been unresolved

since *Ex parte Kenyon*, 14 Fed. Cas. 353 (D.C.W.D. Ark. 1878, No. 7720), which rejected the assertion of such tribal jurisdiction.

The Attorney General of the State of Washington submits that these decisions (*Oliphant* and *Belgarde v. Suquamish Indian Tribe* (Ninth Cir. No. 75-3319, not yet decided) will have a substantial impact upon a number of citizens in the State of Washington and upon the state itself. There are 23 Indian reservations within the State of Washington (see the BIA map which is incorporated in this brief at p. 16). Four of those reservations are located east of the Cascade Mountains in the more sparsely populated areas of the state, although there are within the boundaries of the Yakima Reservation in Eastern Washington two cities having populations in excess of 3,000—Wapato, 3,050 and Toppenish, 6,000. The non-Indian population is greater than the Indian population on the two largest reservations in the state, the Yakima and Colville Reservations in Eastern Washington. The remaining 19 reservations are located in Western Washington, which is the population center of our state, which has a population of 3,494,124.

The Port Madison Reservation, which is the reservation upon which the events giving rise to this decision occurred, is reasonably typical of Indian reservations in the State of Washington. By air or water it is within approximately ten miles of Seattle, the state's largest city with a popula-

tion of 503,500. The reservation consists of 7,275 acres, of which 63% is privately owned in fee simple absolute, free of any trust by the United States. Only approximately 1% is tribally owned, and the remaining 36% remains in allotment status with the patent held in trust by the United States. The approximate population of the Port Madison Reservation is 2,928, of which only 50 are tribal members. The total tribal membership of the Suquamish Indian Tribe is unknown but is estimated to be approximately 150, of which, as indicated above, only 50 live on the reservation. We would emphasize that these statistics with reference to the Port Madison Reservation are reasonably typical. The original boundaries of one of the Puget Sound reservations; i.e., the Puyallup, includes a substantial portion of the city of Tacoma, the state's second largest city.[1]

Thus, thousands of the state's non-Indian citizens reside and work on Indian reservations. They occupy property which they have purchased, or their ancestors have acquired, and have created their homes and cities within reservation areas. Such citizens are not in the status of transients consenting to jurisdiction by their temporary presence. In light of these established living patterns, it

[1] The original Puyallup Reservation encompassed some 18,000 acres, of which all but approximately 33 have been transferred to non-Indian ownership. While the Ninth Circuit resurrected the reservation, there remains the unsettled question as to whether the original boundaries are still intact or whether the reservation may have been diminished in size. See, *U.S. v. Washington*, 496 F. 2d 620 (9th Cir. 1974, cert. den. 419 U.S. 1032).

would be most difficult for such citizens to change their homes and jobs in order to avoid being subject to tribal laws from which they are precluded in having a voice in the creation, enforcement, or adjudication, but nevertheless under the Ninth Circuit determination are subject to those laws. This presents a question of great concern to those citizens and to the state itself.

The State of Washington in response to the Congressional authorization permitting the state's assumption of jurisdiction over Indian reservations, Public Law 83-280 (67 Stat. 588 (1953) (App. B. 24-26)[2] enacted chapter 240, Laws of 1957 (App. B. 29-30)), which provided that upon the petition of the governing body of the tribe the state would assume full jurisdiction to the extent authorized by Public Law 280. In response to that federal and state legislation, nine[3] tribes petitioned for, and the state accepted and has exercised, full jurisdiction. Subsequently in 1963 the Washington state legislature enacted chapter 36, Laws of 1963 (App. B. 32-34), whereby the state assumed the responsibility for full jurisdiction without the necessity of petition by the governing body of the tribe for all non-Indians within the boundaries of a reservation. Further, the state assumed full and complete juris-

[2]All references to App. are to the appendix to Petitioners' brief.

[3]Two of the tribes which originally petitioned for jurisdiction under the 1957 act subsequently requested and the governor granted proclamations of retrocession which were thereafter accepted by the federal government. For those two tribes, the Quinault and the Suquamish, the state's jurisdiction is exercised pursuant to the 1963 state jurisdictional act.

diction over tribal members for the purposes of (1) compulsory school atendance; (2) public assistance; (3) domestic relations; (4) mental illness; (5) juvenile delinquency; (6) adoption proceedings; (7) dependent children; and (8) operation of motor vehicles upon the public streets, alleys, roads and highways. The state also assumed complete and full jurisdiction over tribal members for all other purposes within the reservation except for acts that occurred on tribal or allotted lands.

Pursuant to both the 1957 and 1963 acts, the State of Washington has consistently taken full and complete jurisdiction over all non-Indian acts that occur within the boundaries of the reservations of this state. This assumption of jurisdiction has been a matter of exclusive jurisdiction as is reflected in the Washington Attorney General Opinion, AGO 63-64 No. 68.

II.

ARGUMENT IN SUPPORT OF PETITION FOR CERTIORARI

The split decision by the Ninth Circuit (2 to 1) has observed both in the majority opinion and in the dissent that Indian tribal jurisdiction over criminal conduct by non-Indians has been unresolved by the courts of the United States for almost 100 years. We submit that the magnitude of change reflected by this decision; i.e., recognition of Indian jurisdiction for criminal matters over non-Indians, requires review by this Court, and, we submit, a re-

versal of that decision by this Court. The dissenting opinion set forth in Appendix A, commencing at page A. 21, clearly states the basis for the reversal of this decision. We will attempt to avoid being repetitious, but feel it is necessary to highlight portions of that opinion.

(1) No federal court has had occasion to pass upon the issue of Indian jurisdiction over non-Indians for criminal purposes since *Ex parte Kenyon*, 14 Fed. Cas. 373 (No. 7720, W.D. Ark. 1878 (App. A-21).

(2) Silence in the Treaty of Point Elliott (12 Stat. 927 (1859)) with the Suquamish on the subject of tribal court jurisdiction cannot be taken as assent to jurisdiction over all persons since in earlier treaties when Congress intended it, it has specifically permitted jurisdiction by Indians over non-Indians. (App. A-24). The Treaty of Point Elliott was signed in 1855, hence 7 Op. Atty. Gen. 174, 179 (1855) with reference to the Chocktaw Treaty is pertinent. In response to that treaty the United States refused to affirmatively grant to the Chocktaw Tribe the power to try non-Indians. In so refusing the federal government indicated that it did not consider that power to be an inherent attribute of tribal sovereignty. (App. A-24, 25).

(3) Congress has explicitly provided for exclusive jurisdiction in federal court for major offenses committed by Indians and it would be anomolous to conclude that while tribal courts did not

have jurisdiction to try their own members for major offenses, they retained under some concept of sovereignty the ability to try non-Indians for those same offenses. (App. A-26)

(4) Congress has specifically provided in 18 USC 1165 for a remedy to prohibit unauthorized entry on Indian land for the purposes of hunting and fishing. Congressional statements made in conjunction with that legislation (App. A-27) indicate that the purpose for the legislation is "the fact that Indian tribal law is enforceable against Indians only; not against non-Indians."

The petition for the writ of certiorari filed on behalf of Mr. Oliphant and Mr. Belgarde has extensively set forth reasons which we believe support the granting of a writ of certiorari by this Court. We will not burden the Court by repeating and reiterating the arguments set forth in that petition. We will seek to confine our comments to additional matters that we believe further support the request that the writ of certiorari be granted.

In *U.S. v. Mazurie*, 419 U.S. 544 (1975), Mazurie was convicted in federal court of introducing spirited beverages into Indian country (the Wind River Reservation, Wyoming) in violation of 18 USC 1154. In 1953, Congress had passed local option legislation allowing Indian tribes, with the approval of the Secretary of the Interior, to regulate the introduction of liquor into Indian country so long as state law was not violated (18 USC 1161).

Mazurie operated a liquor outlet within the reservation which was permited by the tribe. The tribe subsequently changed the ordinance and denied a renewal of his license but be continued to sell without the tribally required license. He was tried and convicted for a violation of 18 USC 1154. The significance of the *Mazurie* case to the present proceeding is the fact that this Court extensively discussed:

(1) The question of Congressional power over the reservation area.

(2) The ability of Congress to delegate power to the local Indian tribes; i.e., the local option.

That extended discussion relating to Congressional authority to delegate is basically inconsistent with the approach of the Ninth Circuit in *Oliphant* which has assumed as an attribute of sovereignty that Indian tribes have all powers not restricted by the federal government. The approach taken by the Ninth Circuit, if valid, would mean that this Court extentively discussed issues not necessary for the resolution of the *Mazurie* case. We make this statement with the awareness that this court, *supra*, at 557, stated:

> "We need not decide whether this independent authority [tribal authority] is itself sufficient for the tribes to impose Ordinance No. 26."

This statement appears to reserve the question of tribal jurisdiction to determine whether liquor would or would not be permitted upon the reservation not the question of what would be the appro-

priate forum to try Mazurie for an alleged violation. It is noteworthy that the criminal prosecution in *Mazurie* was in federal court, not in tribal court.

Mazurie cited *Williams v. Lee*, 358 U.S. 217 (1959), in which a non-Indian operating a store within the Navajo Reservation pursuant to a federal license brought suit in Arizona state court to collect a debt from an Indian customer residing on the reservation. While this Court concluded that the state did not have jurisdiction since the transaction involved an Indian on the reservation, the Court did observe, *supra*, at 220:

> "* * * and state courts have been allowed to try non-Indians who committed crimes against each other on a reservation. *E.g., New York ex rel. Ray v. Martin*, 326 U.S. 496. But if the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive. *Donnelly v. U.S.*, 243, 269-272; *Williams v. U.S.*, 327 U.S. 711. * * *"

The second sentence of the above quote refers to a crime by or against an Indian. Congress and the courts have recognized tribal jurisdiction over their own members for acts which occur within the reservation unless such jurisdiction has been limited or modified by Congressional action. There is, however, a lack of authority to support the proposition that the tribe has jurisdiction against a non-Indian for an act committed against an Indian within a reservation. Neither of the cases cited in the above quotation involve prosecutions in tribal court. Rather, both re-

lated to prosecutions in federal court. In *Donnelly v. United States*, 228 U.S. 243 (1912), a non-Indian killed an Indian on the Hoopla Valley Reservation in California. The court held the federal court was the proper jurisdictional tribunal. In *Williams v. U.S.*, 327 U.S. 711 (1946), a non-Indian was charged with statutory rape of an Indian girl within the reservation. Again, the proper jurisdictional forum was the United States federal district court.

The most recent federal court decision cited by both the majority and the dissent relative to the jurisdiction of an Indian tribe over non-Indians is a decision in 1878, *Ex parte Kenyon*, *supra*. Kenyon had been convicted in the Cherokee tribal court for larceny and sought by habeas corpus to challenge the jurisdiction of that tribal court. Kenyon had been married to a Cherokee for six years and had lived on the reservation during that marriage. Upon his wife's death, he left the reservation taking with him a horse that had belonged to his wife. He was charged in tribal court with the removal of that property. The federal court recognized that there was a possibility that Kenyon had become a member of the Cherokee tribe by virtue of his marriage and his living on the reservation. Notwithstanding that possibility, the court concluded that at the time of his arrest, he was a resident of Kansas and of the United States and was not a tribal member either by not having become one or, if so, he had abandoned that status. The court concluded he was therefore

not subject to tribal jurisdiction since tribal courts only have jurisdiction over tribal members committing an act against another tribal member.

While the *Kenyon* case is not a decision of this Court, it has represented the law on this subject for nearly 100 years. As a result, there had not been litigation wherein a tribe has sought to assert criminal jurisdiction over non-Indians for an act occurring within a reservation. As both the majority and dissent indicated in *Oliphant*, this decision by the Ninth Circuit now finding such jurisdiction to exist is new, novel, and without precedent.

The dissenting opinion has correctly indicated the labeling of tribes as sovereign entities has normally been with reference to a dispute between the exercise of a state power and conflict with federal power re regulating commerce with Indians. There are different considerations present when weighing the power of an Indian tribe as it affects the personal lives of non-Indians.

In that context we believe that this Court's decision in *Reid v. Covert*, 354 U.S. 1 (1957), is pertinent to the present litigation. Two cases were combined. Mrs. Covert killed her husband, an Air Force sergeant, while stationed at a military base in England. In the companion case, Mrs. Smith killed her husband, who was in the United States Army, at a military post in Japan. Both of these spouses were tried in military court for the homicides. Congress had explicitly provided in the Code of Military Jus-

tice that such spouses were subject to the jurisdiction of the military court. Further, the United States had an executive agreement with Britain and with Japan which provided that the U.S. military courts had exclusive jurisdiction over U.S. military and their dependents (*supra* at 15). In considering the *Reid* case, this Court observed:

> "* * * In view of our heritage and history of the adoption of the Constitution and the Bill of Rights, it seems peculiarly anomolous to say that trial before a civilian judge by an independent jury picked from the common citizenry are not fundamental rights." *Supra* at 10.

Further,

> "* * * The most transcendant privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors and equals." *Supra* at 9-10.

This Court concluded that the constitutional rights of United States citizens protect them from actions by the United States government even when our citizens are abroad. Considering the constitutional right to a jury trial which is not available under the military code of justice, the court found that the federal legislation which attempted to make military dependents subject to the military court jurisdiction was invalid. The court further considered the executive agreements with Great Britain and Japan, which also provided for U.S. military courts having exclusive jurisdiction over military

dependents. The court observed that treaties (i.e., the executive agreements) had to meet the same constitutional standards that would apply to the federal government insofar as their impact upon American citizens. Thus, those agreements could not be used as a basis for conferring jurisdiction upon the military courts. We believe that it is consistent with the *Reid* decision to conclude that the United States government could not, by treaty with Indians within the territorial limits of the United States, provide that those tribal entities would have jurisdiction to criminally try non-Indians for acts that occurred within the reservation.

We would submit that it would be equally improper under the *Reid* decision to conclude that the United States government in executing treaties with the Indian tribes could by indirection; i.e., simply making no mention in the treaties, accomplish that which would be impermissible for specific inclusion; i.e., the conferring of jurisdiction upon the Indian tribes to try non-Indians in Indian forums for criminal offenses.

III.
CONCLUSION

We respectfully submit that the law over the last 100 years to the effect that tribal courts do not have jurisdiction to try non-Indians for criminal offenses is correct. The Ninth Circuit decision now finding that such authority exists created a situation in which long-time residents of Indian reserva-

tions who cannot participate in the governmental process by which a tribe formulates tribal law, enforces the same, or adjudicates the same, will nevertheless be subject to those laws. This violates the very concept of our governmental system which assures its residents an opportunity to participate in the governmental process affecting their lives. We submit that the questions presented by the petitions in this case go well beyond the question of whether Mr. Oliphant and Mr. Belgarde should or should not be convicted of specified cimes. Our interest in this proceeding is the impact upon the citizens of the State of Washington who live on these reservations wherein frequently the Indian population constitutes a very small percentage of the total; for example, on the reservation in question less than 2% of the population are members of the Suquamish Indian Tribe. We therefore respectfully submit that the petitioners' application for writ of certiorari be granted.

DATED this 21st day of December, 1976.

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I hereby certify that on this 22nd day of December, 1976, three copies of Brief of Attorney General of the State of Washington as Amicus Curiae in

Support of Jurisdictional Statement were mailed, postage paid, to Philip P. Malone, Attorney at Law, 153 1st Avenue, Poulsbo, Washington 98370, attorney for petitioners; Ron Sims, Acting United States Attorney, 1012 U.S. Courthouse, Seattle, Washington; Richard Neely, Regional Solicitor, Department of the Interior, P. O. Box 3621, Portland, Oregon; Robert H. Bork, Solicitor General, Room 5143 Justice Building, Washington, D.C.; and Barry Ernstoff, Ziontz, Pirtle, & Morisett, 200 Pioneer Bldg., 610 1st Avenue, Seattle, Washington 98104. I further certify that all parties required to be served have been served.

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APPENDIX A

PROXIMITY OF INDIAN RESERVATIONS TO MAJOR POPULATION CENTERS IN WASHINGTON STATE